ACME CANNING CORPORATION LTD. v. LEE KIM SENG

[A.C.J. (Arulanandom J.) April 12, 1976]
[Penang — Originating Motion No. 20 of 1973]

Industrial Law — Overtime wages — Work on rest days — Whether employee entitled to overtime wages — Express conditions of work — Extra benefits received in lieu of overtime and Sunday allowances — Employment Ordinance, 1955, ss. 6 and 7.

This was an appeal against the decision of the Labour Officer, Butterworth who awarded a sum of $2,865.11 as overtime wages and double wages for working on rest days. The respondent was employed as a foreman in the factory and had agreed to work as a monthly rated employee under the terms and conditions which provided no limit in hours in return for such benefits as housing allowance, food allowance, bonus and incentive payments.

Held, allowing the appeal: (1) it was clear from the evidence that although there was no written contract of service there was a well-defined and well-understood oral contract of service between the parties and in view of this and of sections 6 and 7 of the Employment Ordinance, the respondent was not entitled to overtime payment;

(2) in view of the extra benefits given to the respondent in lieu of overtime and Sunday allowances the respondent could not claim the said allowances after voluntarily accepting the alternatives.

Cases referred to:-

(1) *Eastern Mining and Metals Co. Sdn. Bhd.* v. *M.M. Ismail & Ors.* [1976] 1 M.L.J. 166.

(2) *Lissender* v. *C.A.V. Bosch Ltd.* [1940] A.C. 412.

ORIGINATING MOTION.

S. Kulasegaran for the appellant.

Ariffin bin Haji Daud for the respondent.

Arulanandom J.: This is an appeal from the decision of the Labour Officer, Butterworth awarding a sum of $2,865.11 as overtime wages and requiring the appellant to pay to the Assistant Director of Labour, Butterworth, on behalf of the complainant a sum of $2,865.11 being awards due as follows: —

(1) Overtime wages for the period 10.10.69 - 20.11.72 being	$2,434.34
(2) Double wages for work on Rest Days for the period 10.10.69 to 20.11.72	$ 430.77
	$2,865.11

The order was made in respect of a claim by the respondent Lee Kim Seng in respect of the following:—

(1) Overtime wages for the periods June 1965 to 9.10.1969 and 10.10.1969 to 20.11.1972 amounting to $4.054.50 cents and $2,434.34 respectively (section 60A(1) - (9)).

(2) Double pay for work on Rest Days for the period 10.10.1969 to 20.11.1972 amounting to $430.77 (section 59(1) to (2) and 60(1) to (3)).

The Labour Officer who conducted the inquiry held quite correctly that the respondent was not eligible for overtime wages for the period up to October 9, 1969 for the following reasons:—

(1) the question of payment of overtime wages for work done for more than 8 hours per day was not a condition of the contract of service between the complainant and his employer.

(2) the Employment Ordinance 1955 did not make provisions for payment of overtime wages to a labourer who works for more than 8 hours per day before October 10, 1969.

According to the respondent he was employed by the appellants during the relevant period after October 1969 as a supervisor. His salary was $220/- p.m. in 1969 and $280/- p.m. in 1970, 1971 and 1972. In addition to his salary he was given food allowance at $40/- a month, housing allowance at $30/- a month, travelling allowance when he had to travel by bus, incentive payments, medical benefits and bonuses. In the course of his evidence, he says *inter alia* that (1) the company has been overpaying him to the extent of $85/- as follows:—

Food allowance	$40/-	
Housing allowance	$30/-	
Travelling allowance	$15/-	(assuming)
	$85/-	

(2) there were days when there was no work for 8 hours in a day and that whether or not he worked for less than 8 hours per day, he was paid a sum of $280/- at the end of the month; (3) In return he also agreed to work as and when there was extra work to cope with and to work at extra speed if necessary; (4) there were two categories of employees in the company (a) daily-rated employees and (b) monthly-rated employees. (5) As far as the daily-rated employees were concerned they were paid by the hour and when they worked overtime they were paid overtime wages but at the same time daily-rated employees did not get any housing allowance, food allowance or incentive payments based on production; monthly-rated employees on the other hand got food allowance, medical leave, hospitalisation benefits and annual leave. (6) In his own case, he was given a housing allowance also. (7) the monthly-rated staff was getting much more than the daily-rated staff and that he could have reverted from monthly-rated to daily-rated but that he never thought of reverting himself from the monthly-rated to the daily-rated as he was getting more by being on the monthly-rated staff than on the daily-rated. (8) he was not to get overtime wages but in lieu got the benefits above stated. He went on to say that whenever there was no raw material there was no work to be done and that he was happy to work as a monthly-rated worker and was prepared to work under all conditions for the monthly-rated staff which included without limit in hours in return for such benefits as housing allowance, food allowance, bonus and incentive payments. He said his duty was that of supervising the workers.

In cross-examination he agreed that there were two types of work done by him, (1) to supervise workers, and (2) to maintain the record of the workers of the daily production of the factory and to report the amount of raw materials used to the storekeeper. He went on to say that "when I am supervising I just stand around being inactive" and that maintaining the records of the daily production of the factory and to report the amount of raw materials used to the storekeeper took only about half-an-hour. The actual work done by him in a day took only about half-an-hour. No records were kept of hours of work although he stated that he used to report for duty at 7.30 in the morning and sometimes worked for 10 to 11½

hours a day. From his own evidence respondent was quite happy with his conditions of service and had willingly accepted them but some time in the latter part of 1972 there was trouble over the respondent "flirting with factory workers" which the respondent denied but which apparently led to his company asking him to resign. This claim was brought after his resignation and it is quite apparent that had it not been for his being asked to leave this claim would never have been before the Commissioner. It was also agreed by him that when he resigned he was paid the sum of $700 which was one month's salary plus $500 less E.P.F. up to December 30, 1972. The respondent had one witness who appeared to have worked with him as a mechanic but he was also paid $180/- a month without overtime but he received some form of payment for overtime work. However he left the appellant company around 1969 and therefore his evidence is not of much value.

The manager of the appellant company gave evidence and confirmed that he had two types of staff in his company, one, daily-rated who were paid by the hour and the other monthly-rated. The daily-rated workers did not receive food allowance, incentive payments or medical benefits but received transport and overtime and all other benefits in accordance with the Employment Ordinance. The monthly-rated staff got a monthly pay irrespective of whether there was work in the factory or not and irrespective of the time they went home. Sometimes they went back at 11.00 a.m. and other times at 5.00 p.m. or at 9.00 or 10.00 p.m. In addition to their salaries they got the following benefits: food allowance, transportation, medical benefits, bonus, incentive payments which was also known as overtime allowance, housing allowance limited to three staff only including the respondent, and Sunday allowance which was included in the incentive payment. He states that if raw materials were not available there would be no work in the factory. Roughly for about 8 days in a month there would be no raw materials and the factory was in production during the remaining 22 days of the month. When the factory was in production the employees normally went off at 3.00 in the afternoon. Later he went on to say that he agreed that the respondent had to work in excess of 8 hours a day when there was a lot of raw material to be canned and that he had to work 10 days in a month in excess of the 8 hours a day.

The record of evidence in this case took 43 pages of closely typed foolscap but on perusing the record the least that can be said is that a lot of irrelevant, immaterial and unnecessary evidence was recorded. If the case had been confined to relevant evidence 10 pages would have been more than enough. However in the light of all this evidence the Labour Officer made the award as aforesaid.

On reconsidering the whole case, it is clear that there were only two issues to be decided: the first is whether, in view of sections 6 and 7 of the Employment Ordinance, the respondent was entitled to any overtime wages.

Sections 6 and 7 of the Employment Ordinance 1955 (No. 38 of 1955) reads as follows: —

"6. Every agreement lawfully entered into between an employer and a labourer or between persons to whom a resolution under subsection (3) or subsection (4) of section 2 of this Ordinance applies under which one of the parties thereto has agreed to work for the other party and which was entered into before the date of commencement of this Ordinance or before the date of coming into force of any such resolution as aforesaid, as the case may be, shall if it is still legally binding upon the parties at such date continue in force thereafter for such period as may be specified in such agreement and, subject to any express condition contained in such agreement, the parties thereto shall be subject to, and shall be entitled to the benefit of, the provisions of this Ordinance.

7. Except as provided in section 6 of this Ordinance, no condition of any contract of service shall be contrary to the provisions of this Ordinance and any such condition which is contrary to such provisions shall be void and of no effect."

So, by the terms of the Ordinance, if a party is subject to any express condition in any previous contract of service, he shall only be entitled to the benefit of the Ordinance subject to the express condition of his contract of service and the benefits of section 7 of the Employment Ordinance are also subject to the provisions of section 6.

It is clear from the evidence that although there was no written contract of service there was a well-defined and well-understood oral contract of service between the parties, and express condition does not necessarily mean written. It is only in contrast to implied. Reading the evidence as a whole the employer appears to have given the true state of affairs obtaining in his company. There are two different types of employees: one, daily-rated who were paid by the hour and who in accordance with the Ordinance were paid overtime for work in excess of the statutory 8 hours and the other benefits in accordance with the Employment Ordinance; the other, monthly-rated employees who were employed on the following terms and conditions: —

(1) monthly-paid irrespective of whether there was work in the factory or not and irrespective of the times they go home;

(2) food allowance;

(3) transportation in lieu of transport allowance;

(4) medical benefits;

(5) bonus;

(6) incentive payment, which is known as overtime allowance, and housing allowance limited to three staff only;

(7) Sunday allowance which is included in the incentive payment.

The terms and conditions of service of the respondent were as set out in pages 30 and 31 of the record, namely,

(a) The complainant would be the foreman of the factory and that he was empowered to employ or dismiss factory staff.

(b) The salary of the complainant would be increased by another $60/- per month to a salary of $280/- per month.

(c) The complainant would be responsible for the proper production of the canned food in the factory.

(d) His job as a foreman would be to record the daily production, to see that the seamed cans are correctly processed or sterilised.

(e) That the correct formula is used by the cook.

(f) That good cans are being used for the process.

(g) That no other unwanted materials are filled into the cans.

(h) To set a good example for his subordinates to follow.

The complainant accepted the above terms and conditions of service. It was agreed that his working hours were as before that is from 7.30 a.m. in the morning up to the time of production which may be earlier than 5.00 p.m. or later than 5.00 p.m.

(i) The complainant would also continue to get the other benefits that he was getting before such as food allowance, bonus, medical benefits, travelling allowance.

From the evidence of both the respondent and the manager these terms were agreed upon and as the respondent himself has said if he had wanted to claim overtime he could have reverted to daily-rated status but he did not do so, because it was far more beneficial for him to remain on the terms and conditions in which he was employed.

It necessarily follows that any entitlement of overtime under the Ordinance was subject to these express conditions which the respondent himself had accepted. The Labour Officer who made the award does not touch on the submission of counsel for the company that the respondent was not entitled to overtime because of sections 6 and 7 of the Ordinance. Although he says the question of overtime was not a condition of his service he does not go on to say why section 6 of the Ordinance did not apply. The only reason this court can think of is that perhaps he misinterpreted the meaning of 'express' to mean "written". He does not give any reason why sections 6 and 7 were not applicable in this case. So, in view of my interpretation of sections 6 and 7 the respondent is not entitled to this claim and the appeal should be allowed and the claim dismissed.

Assuming the Labour Officer is correct and the amount awarded by him is payable by the company, then again one should consider whether in view of the extra benefits given to the respondent in lieu of overtime and Sunday allowances, the respondent could now claim the said allowances after voluntarily accepting the alternatives. In *Eastern Mining & Metals Co. Sdn. Bhd.* v. *M.M. Ismail & Ors.*[1] the plaintiff according to his terms of service was entitled to two months' notice in writing or two months' pay in lieu of notice if his services were terminated. He was not a member of the Employees Union of the company but the Union had made an agreement with the Employer Company whereby it was agreed between the Union and the Company as follows:—

"Part III of the agreement is headed 'Medical Benefits'.

Section 1(g)(i) of that part reads:—

'(g)(i) An employee who, after a minimum of five years continuous and good service is retired or retrenched by the Company shall be entitled to the same benefits as laid down in paragraph (f) above.'

Paragraph (f) reads:

'(f) If, in the opinion of the Company's Medical Officer, an employee is medically unfit to continue to be employed by the Company, he/she shall be paid two months' salary (in lieu of notice) and two weeks' pay for each year of continuous service over one year. The rates shall be based on the salary at the time of termination of service'."

When the plaintiff in that case was retrenched the company gave him the benefits which were due under the collective agreement, although he was not strictly speaking entitled to them and gave a statement of final emoluments due to him which the plaintiff confirmed and agreed as correct as final emoluments due to him which was over and above what was legally due to the plaintiff under his contract of service. The company gave the plaintiff one month's salary as an ex gratia payment. The Federal Court held that in that case although technically the company had not given the plaintiff two months' salary in lieu of notice because of the other benefits which they gave him, the principle of approbation and reprobation or doctrine of election applied following the case of *Lissenden* v *C.A.V. Bosch Ltd.*[2] His Lordship Suffian L.P. states that the benefits to which the plaintiff was entitled under his contract of service, that is to say, two months' salary in lieu of notice, are merged with his benefits under the collective agreement and that if he accepts the greater benefits under the collective agreement he cannot at the same time collect the lesser benefits under his contract of service. To use Suffian L.P.'s words, he says:

"....In accordance with his contract of service the company was to pay him out of its right pocket, but instead it elected to pay him out of its left pocket. He insists that the company should also pay him out of its right pocket notwithstanding that the amount already received by him from the left pocket is more than what he would have received from the right pocket. My answer to that is that in the circumstances of this case, he cannot claim to be paid out of both pockets."

The Federal Court therefore allowed the appeal by the company against the High Court's upholding of the Magistrate's Court award to the employee (the plaintiff).

In the case before us it is clear by the respondent's own admission that the benefits he obtained were greater than the benefits he would have got if he had elected to be on equal terms of service with the daily-rated employees who were entitled to overtime, and, furthermore, he admits that the company has been overpaying him to the extent of $85/-, i.e.,

food allowance	$40/-	
housing allowance	$30/-	
travelling allowance	$15/-	(assuming)
	$85/-	

If this were correct, then, for the period October 10, 1969 to November 20, 1972 if he was overpaid $85/- a month for the period this will amount to $3,078/-. In addition the respondent received $500/- as an ex gratia payment when he left. This does not take into account the medical benefits he received. According to respondent's own evidence he agreed to work as a monthly-rated employee under the terms and conditions which included without limit in hours in return for such benefits as housing allowance, food allowance, bonus and incentive payments. Having agreed to accept these benefits under a scheme of service instead of overtime benefits which he would have received otherwise, he cannot now come to court and complain that he is entitled to receive overtime benefits. This is not a case where an employee who by virtue of his inability to obtain other employment

or other schemes of service has been forced to work overtime. The type of work which the respondent did, according to his own evidence, involved long periods of standing by doing nothing, i.e., the actual work he had to do was of much shorter period than 8 hours. It was the nature of the work which persuaded him to continue under the terms and conditions of his service. He himself has said that he made no protest, no complaint, nor did he want to alter his terms of service. It seems apparent from the history of the case that his claim was purely prompted by his having been asked to resign from the employment. However this court need not make any finding on why he left employment. The question is whether on the principle laid down in *Eastern Mining & Metals Co. Sdn. Bhd.* v. *M.M. Ismail & Ors.* he could now claim overtime. The answer must be in the negative. So, even if the Labour Officer was correct in his decision that overtime allowances were due to the respondent it is quite apparent that the Respondent has received much more than his entitlement of $2,865.11 (the Labour Officer's award) and hence the appeal must succeed.

The appeal is therefore allowed and the Labour Officer's Order of October 13, 1973, set aside with costs.

Appeal allowed.

Solicitors: *Ranjit, Thomas & Kula; Ariffin & Co.*

KANNAPPA CHETTIAR v. VELLASAMY PILLAI

[O.C.J. (Mohamed Azmi J.) August 25, 1976]
[Kuala Lumpur — Civil Suit No. 551 of 1973]

Practice & Procedure — Order by consent — Application to set aside order — Plaintiff not a party to the consent order.

In the 1947 case, the defendant claimed a lien of P.R.N.N Firm's documents until full and complete payment of his salary owed to him by the said firm had been made to him. By a consent order dated May 24, 1948, made between P.R.N.N. Firm and the defendant, the defendant agreed to abandon his lien over the documents and in place thereof had agreed to accept a lien over the three parcels of land as security for his counterclaim (for payment of his salary). When the 1947 case finally came out for final disposal, judgment was given in favour of the defendant in his counterclaim. Consequently, he proceeded to enforce the judgment by filing an application to sell the three parcels of land given as security by the firm vide the consent order of May 24, 1947.

The plaintiff sought for a declaration that the said consent order was no longer operative and the defendant had no right of lien over the three land titles. At the material time, the plaintiff was only acting as attorney for P.R.N.N. Firm and was never a party to the consent order. The plaintiff became the registered owner of the property only after March 1, 1949. When the titles were originally deposited with the defendant they were registered in the name of one Subramanian.

Held, dismissing the plaintiff's claim: (1) the plaintiff had no *locus standi* to initiate the present suit in his personal capacity;

(2) although an order by consent is not a contract, it is sufficient evidence of the contract upon which it is based, and such contract is not less a contract and subject to the incidents of a contract because there is superadded the command of a judge. A judgment by consent is binding until set aside, and acts as an estoppel.

Cases referred to:-

(1) *Mohamed Salleh* v. *Lau Siok Kee* [1974] 1 M.L.J. 102 F.C.

(2) *Kinch* v. *Walcott & Ors.* [1929] A.C. 482.

CIVIL SUIT.

Morris Edgar for the plaintiff.

M. Mahalingam for the defendant.

Mohamed Azmi J.: This is a claim by KN.PR. Kannappa Chettiar for a declaration that the order of Russell J. dated May 24, 1948 in Kuala Lumpur High Court Civil Suit No. 62 of 1947 (hereinafter referred to as "the 1947 case") is no longer operative and that the defendant has no right of lien over the titles of the land held under C.T. No. 8691 and E.M.R. No. 2640 both in the Mukim and District of Batang Padang and E.M.R. No. 5000 (now 2760) in the Mukim of Durian Sebatang District of Lower Perak, and that the same should forthwith be returned by the defendant or his solicitors to the plaintiff.

The brief facts of this case are as follows. On October 31, 1947 soon after the Japanese Occupation, one moneylending P.R.N.N. Firm, of which the present plaintiff was the attorney, filed the 1947 case against the present defendant as first defendant, and one Periyakaruppan Chettiar s/o Arunasalam Chettiar as second defendant — the former being a clerk and the latter as agent of the firm. Various reliefs were sought against the two defendants relating to the business of the P.R.N.N. Firm which included the taking of accounts and, in particular, an order was sought against the first defendant (hereinafter referred to as "the present defendant") to deliver to the firm account books, documents of titles and negotiable instruments belonging to the firm. These documents were kept in a box, locked by a padlock in the firm's premises, but the key to the padlock was kept by the present defendant. In his defence in the 1947 case, the present defendant contended that P.R.N.N. Firm and its three subsidiaries owed him $9,292.77 as salary, bonus and expenses, and that he was entitled to a lien over the firm's documents which were in his constructive possession until full and complete payment was made to him. In the event, he counterclaimed against the firm for the sum of $9,292.77. In order to obtain its documents before the final disposal of the 1947 case, P.R.N.N. Firm by Summons-in-Chambers dated May 11, 1948 made an interlocutory application under section 499 of the then Civil Procedure Code; and on May 24, it obtained a consent order from Russell J. for the delivery by the present defendant of the account books, documents of titles, etc., which formed part of the subject-matter of the 1947 case, upon the firm furnishing him with certain security. The relevant part of the consent order affecting the present defendant reads as follows:

"*IT IS ORDERED* that the 1st defendant abovenamed do deliver to the plaintiff herein the books of account, documents of title and negotiable instruments forming the subject matter of this suit upon the plaintiff furnishing security to the 1st defendant as contained in the letter from the plaintiff's Solicitors to the 1st defendant's Solicitors dated April 5, 1948" (See Exhibit AB49).

Some time on August 12, 1948, pursuant to the consent order, P.R.N.N. Firm deposited with the present defendant through their respective solicitors the